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In the Supreme Court of the United States

October Term, 1979
No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,
Appellants

v.

LONDON GROVE TOWNSHIP, et al.
Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, NO. 482 JANUARY TERM 1978

JURISDICTIONAL STATEMENT MOTION OF DANIEL E. BLEVINS AND HELEN K. BLEVINS TO DISMISS OR AFFIRM

ROBERT W. LENTZ
30 Darby Road
Paoli, Pennsylvania 19301
(215) 647-3310
Attorney for Intervening Appellees

Of Counsel:
LENTZ, RILEY, CANTOR, KILGORE & MASSEY, LTD.
30 Darby Road
Paoli, Pennsylvania 19301

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

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Appeal From the Supreme Court of Pennsylvania
No. 482 January Term 1978

JURISDICTIONAL STATEMENT

Motion to Dismiss or Affirm

Comes now Daniel E. Blevins and Helen K. Blevins, Intervening Appellees in the above-captioned matter, and move this Honorable Court either to dismiss the appeal of Messrs. Kavanagh, *et al.*, or in the alternative, to affirm the judgments of the Courts below, for the following reasons:

1. *The appeal is not within the jurisdiction of this Court, in that it was not taken in conformity with the statutory requirement that it be taken within ninety (90) days after the entry of final judgment. 28 U.S.C.A. Section 2101(c) (1961).* An appeal to the Supreme Court of the United States from a final judgment or decree in a civil action before the Supreme Court of Pennsylvania must be taken within ninety (90) days after the entry of such judgment or decree. 28 U.S.C.A. Section 2101 (c) (1961). In this instance the Supreme Court of Pennsylvania entered final judgment in the above-captioned matter on July 6, 1979. Thereafter appellants filed a petition for reargument and on August 22, 1979, that petition was denied by the Court. The above-captioned appeal was taken on November 5, 1979, 122 days after the date of final judgment, but only 75 days after the date of denial of the petition for reargument. The question presented is whether a petition for reargument automatically tolls the appeal period.

This question has been presented to this Court at various times in the past. The most widely cited case with respect to this question is *Citizen's Bank of Michigan City, Indiana v. Opperman,* 249 U.S. 448 (1919). In that case this Court stated:

> Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three-month limitation begins to run from the date of such denial or other disposition.

Other cases are in accord. *Gypsy Oil Co. v. Escoe,* 275 U.S. 498 (1927); *Chicago Great Western R.R. v. Basham,* 249 U.S. 164 (1919); *Northern Pacific R.R. Co. v. Holmes,* 155 U.S. 137 (1894).

However, Intervening Appellees believe that there is one overriding distinguishing factor between all of the above cases and the present appeal. In the above cases the respective state law provided that a petition for reargument filed with the relevant state court acted as a tolling or suspension of the final judgment of that court until completion of consideration of the petition for reargument. *See Gentry v. Ragan,* 13 N.E.2d 872 (Ind. 1938); *Wilson v. Katzer,* 226 P.2d 910 (Wash. 1951). However, this is not the case in Pennsylvania. The courts of Pennsylvania have continuously held that the filing of a petition for reargument "will not affect the final judgment unless the Court retains control, as for example, by staying all proceedings in the meanwhile." *Baily Petition,* 365 Pa. 613, 618, 76 A.2d 645, 648 (1950). See also *Smith v. Jones,* 369 Pa. 13, 85 A.2d 23 (1952); *Silver, Lovitz and Atkinson v. Scaltrito,* 239 Pa. Superior Ct. 253, 361 A.2d 705 (1976).

The reasoning behind the Pennsylvania position appears to arise from both the nature of a petition for reargument and the Pennsylvania practice in considering such a petition. First, the nature of a petition for reargument is dramatically different from that of a petition or request for retrial. The petition for reargument is merely a petition for reconsideration by the court last rendering judgment. In this case the petition took the form of a request by the Appellants to the Pennsylvania Supreme Court to rehear argument on the case in which the Court had already issued final judgment. The petition did not request the reopening of any proceeding at

which the taking of additional testimony or re-examining of witnesses could be conducted.

The procedure in Pennsylvania for disposing of a petition for reargument or reconsideration lends further support to the position by the Pennsylvania courts that such a petition does not toll or affect the finality of the judgment. In Rules 2541 through 2547 of the Pennsylvania Rules of Appellate Procedure, which are appended hereto as *Appendix A*, the Supreme Court of Pennsylvania has provided the practice for consideration of applications for reargument. Rule 2543 states: "Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefore." Pa. Rules of Appellate Procedure, Section 2543. While the rules set forth the contents for an application for reargument, and include a provision that there shall be no supporting brief filed by the petitioner, they further provide in Rule 2545, Pa. Rules of Appellate Procedure, Section 2545:

> No answer in opposition or separate motion to strike an application for reargument would be received unless requested by the Court. No application for reargument will be granted and the judgment of the Court modified the absence of such a request and an opportunity to submit a reply in response thereto.

In short, the Pennsylvania procedure provides the opportunity to file a petition for reargument and the opportunity for the appellate court to determine whether it will even entertain the consideration of such a petition. It is only after the preliminary determination by the Court

that they will entertain a motion for reargument that the finality of the previous decision of the Court is brought in question. Therefore, under Pennsylvania law that judgment remains unaffected, with respect to its finality, by the mere filing of a petition for reargument with an appellate court.

In this instance the Appellants received a final judgment from the Pennsylvania Supreme Court on July 6, 1979, Subsequent thereto they filed a petition for reargument with the Pennsylvania Supreme Court and received from the Prothonotary of the Supreme Court a letter dated August 28, 1979, informing them that, on August 22, 1979, the Pennsylvania Supreme Court had denied their petition. The Court did not formally accept for consideration the petition for reargument and the Appellees were never advised to file any response thereto. Clearly under Pennsylvania law the decision of the Supreme Court filed July 6, 1979 was, and remained, a final judgment. Since the Appellants have failed to file an appeal to this Court within 90 days of the rendering of the final decision of the Pennsylvania Supreme Court their appeal is untimely and consideration of the appeal by this Court should be refused.

2. *The questions upon which the decision of the case depends are so unsubstantial as not to need further argument.* To be valid a local zoning ordinance must have as its objectives the preservation or furtherance of the health, safety and general welfare of the community and the ordinance must be drawn to rationally promote its objectives. *County Board of Arlington v. Richards,* 434 U.S. 5 (1977). The question raised before, and adjudicated by, the Supreme Court of Pennsylvania was whether

the ordinance of London Grove Township had the required nexus to the health, safety and general welfare and whether it was drawn to rationally promote that nexus.

First it is important to focus on the health, safety and general welfare problems which arise with respect to sanitary landfills. The Appellants' witnesses, especially Dr. Schoenberger, testified at length about these problems. The problems include pollution of groundwater as a result of dumping chemical waste or of not providing adequate base; rodents and insects as a result of inadequate cover or lack of coverage; litter; erosion; danger from machine operation; noise pollution; methane gas; and a lack of financial responsibility. Clearly without control of these problems sanitary landfills would become such a danger to the health, safety and general welfare as to warrant their prohibition.

The record shows that these problems are in fact regulated by the Department of Environmental Resources of the Commonwealth of Pennsylvania. The Department has established guidelines for sanitary landfills and has established a permit and inspection procedure under the Pennsylvania Solid Waste Management Act, Pa. Stat. Ann. Tit. 35, Sections 6001-6017 (Purdon 1977). On paper, this program attacks most of the problems discussed above, although financial responsibility and litter control are not fully regulated. But full compliance with this program is necessary to prevent the hazards to health and safety discussed above.

The Appellants' witnesses then testified that noncompliance and violation of the Department's regulations are a daily occurrence. Almost every inspection by the

Department evidences numerous violations of the regulations, even in sanitary landfills operating under Department permit. This occurs even though the operators of sanitary landfills often know ahead of time that an inspection will be made. In fact, some violations cannot be avoided in the normal course of sanitary landfill operations. Thus, while the regulations are important in controlling the detrimental effects of sanitary landfills, they leave at least two gaps: the constant violations and the unregulated problems.

Next it is important to understand the further problem posed by reliance upon the regulations. While they, in the abstract, provide control of sanitary landfills, they, in practice, lack effective enforcement. It is difficult, if not impossible, for the Department to effectively enforce its regulations. This conclusion was voiced by the Appellants' own expert, Dr. Schoenberger. In addition, the Appellants' witnesses from the Department testified as to the extensive legal procedures and the length of time necessary for injunctive relief or permit revocation. Some violations are still in existence three years after the violations have become known and after they have started to adversely affect the public health, safety and general welfare.

In light of this testimony presented by the Appellant, it was laudible, not unreasonable, that the Board of Supervisors of London Grove Township sought extra protection for its citizens against the problem of sanitary landfills and the inadequacy of present regulatory controls and enforcements. There was clearly the nexus between the use and the adverse impact on the health, safety and general welfare. As the testimony demonstrates the

problems which remain dealt with (1) unregulated or underregulated problems; (2) continuing violations; and (3) slow enforcement procedures. Clearly, regulations could be enacted for problem after problem as they come to light. And clearly, constant and more vigorous inspections by a larger staff of the Department could decrease violations of regulations. But it is doubtful that constitutional due process would permit much improvement in enforcement procedures.

In light of this, London Grove Township established a regulation which would rationally be expected to help meet all three problems. Its answer has been to make each sanitary landfill operator subject to local public pressure. As the Appellants' engineer testified municipal sanitary landfills are subject to pressure through the governmental system which is responsible for them. The local authority, the Southeastern Chester County Refuse Authority, has testified to examples of that responsiveness. Thus, in short, since the substantial dangerous problems of sanitary landfills are not, by experience and by admission of the Appellant, solvable by either normal regulation or normal legal process, London Grove Township has turned to the use of the political process to help solve its problems. Having established the nexus between the use and the health, safety and general welfare it is clear that the Township's ordinance has been drawn to rationally promote the objectives of its regulation. *County Board of Arlington v. Richards, supra.*

It is clear that the three justices of the Supreme Court of Pennsylvania who acted in support of affirmance of the decision of the Commonwealth Court of Pennsylvania applied the test and reasoning set forth in the *County Board of Arlington* case. As Mr. Justice Roberts stated:

> I would hold, therefore, as the Board, the Court of Common Pleas of Chester County and the Commonwealth Court, that the Township's concerns for public health manifested by its enforcement of sanitary regulations, and the continued operational stability of the Township's sanitary landfill operations is entirely reasonable. This governmental exercise of its police function simply cannot be judged so unrealistic as to make the zoning provisions unconstitutionally arbitrary.

For the foregoing reasons, Intervening Appellees ask that either the appeal be dismissed or the decision of the Courts below be affirmed.

Respectfully submitted,

ROBERT W. LENTZ,
30 Darby Road
Paoli, Pennsylvania 19301
(215) 647-3310
Attorney for Intervening Appellees.

Of Counsel:

LENTZ, RILEY, CANTOR, KILGORE & MASSEY, LTD.
30 Darby Road
Paoli, Pennsylvania 19301

Filed: December 20, 1979

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 1979, one copy of this brief was served by first class mail, postage prepaid, on the following attorneys:

Lawrence E. Wood, Esquire
126 Miner Street
West Chester, Pennsylvania 19380

John F. Stoviak, Esquire
2600 Fidelity Building
Philadelphia, Pennsylvania 19101

I further certify that all parties required to be served have been served.

ROBERT W. LENTZ
30 Darby Road
Paoli, Pennsylvania 19301
Attorney for Intervening Appellees

APPENDIX A

PENNSYLVANIA RULES OF APPELLATE PROCEDURE

Rules 2541-2547

APPLICATION FOR REARGUMENT

Rule 2541. Form of Papers; Number of Copies

All papers relating to applications for reargument shall be prepared in the manner prescribed by Rule 2171 (method of reproduction) through Rule 2174 (tables of contents and citations). Seven copies shall be filed with the original.

Note: This rule and the succeeding rules on reargument practice are patterned after the practice in Rules 1111 et seq. (petition for allowance of appeal).

Amended June 23, 1976, effective July 1, 1976.

Rule 2542. Time for Application for Reargument

An application for reargument shall be filed with the prothonotary within 14 days after entry of the judgment or other order involved.

Note: Former Supreme Court Rule 64, former Superior Court Rules 55 and 58 and former Commonwealth Court Rule 113A required the application for reargument to be filed within ten days of the en-

try of the order. Under Rule 105 (b) (enlargement of time) the time for seeking reargument may be enlarged by order, but no order of the Superior Court or of the Commonwealth Court, other than an actual grant of reargument meeting the requirements of Rule 1701 (b) (3) (authority of lower court or agency after appeal), will have the effect of postponing the finality of the order involved under Rule 1113 (time for petitioning for allowance of appeal).

It is important to note that unlike other provisions of these rules the mailing of an application for reargument does not toll the time for seeking reargument. Under this rule and Rule 121 (filing and service) the application for reargument must be received by the appellant prothonotary within the 14 day period.

Amended June 23, 1976, effective July 1, 1976; amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2543. Considerations Governing Allowance of Reargument

Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefor.

Note: The following, while neither controlling nor fully measuring the discretion of the court, indicate the character of the reasons which will be considered:

(1) Where the decision is by a panel of the court and it appears that the decision may be inconsistent with a decision of a different panel of the same court on the same subject.

(2) Where the court has overlooked or misapprehended a fact of record material to the outcome of the case.

(3) Where the court has overlooked or misapprehended (as by misquotation of text or misstatement of result) a controlling or directly relevant authority.

(4) Where a controlling or directly relevant authority relied upon by the court has been expressly reversed, modified, overruled or otherwise materially affected during the pendency of the matter sub judice, and no notice thereof was given to the court pursuant to Rule 2501 (b) (change in status of authorities).

Rule 2544. Contents of Application for Reargument

(a) General rule. The application for reargument need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall insofar as practicable, be set forth in the order stated):

(1) A reference to the order in question or the portions thereof sought to be reargued, and the date of its entry in the appellate court. If the order is voluminous, it may, if more convenient, be appended to the application.

(2) A specification with particularity of the points of law or fact supposed to have been overlooked or misapprehended by the court.

(3) A concise statement of the reasons relied upon for allowance of reargument. See Rule 2543 (considerations governing allowance of reargument).

(4) There shall be appended to the application a copy of any opinions delivered relating to the order with respect to which reargument is sought, and, if reference thereto is necessary to ascertain the grounds of the application for reargument, slip opinions in related cases. If whatever is required by this paragraph to be appended to the application is voluminous, it may, if more convenient, be separately presented.

(b) No supporting brief. All contentions in support of an application for reargument shall be set forth in the body of the application as prescribed by Paragraph (a) (33) of this rule. No separate brief in support of an application for reargument will be received and the prothonotary of the appellate court will refuse to file any application for reargument to which is annexed or appended any supporting brief.

(c) Length. Except by permission of the court, an application for reargument shall not exceed ten pages of conventional typographical printing or 15 pages of any other process of duplicating or copying exclusive of pages containing table of contents, table of citations and any addendum containing opinions, etc., or any other similar supplementary matter provided for by this rule.

(d) Essential requisites of application. The failure of an applicant to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring reconsideration will be a sufficient reason for denying the application.

(e) Multiple applicants. Where permitted by Rule 512 (joint appeals) a single application for reargument may be filed.

Note: Former Supreme Court Rule 64, and former Superior Court Rule 113A permitted the applicant in effect to dump an undigested mass of material (i.e., briefs in and opinions of the court) in the lap of the court, with the burden on the individual judges and their law clerks to winnow the wheat from the chaff. This rule, which is patterned after Rule 1115 (content of petition for allowance of appeal), places the burden on the applicant to prepare a self-contained succinct and coherent presentation of the case and the reasons in support of allowance of reargument.

Amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2545. Answer to Application

No answer in opposition or separate motion to strike an application for reargument will be received unless requested by the court. No application for reargument will be granted and the judgment of the court modified in the absence of such a request and an opportunity to submit a reply in response thereto.

Note: Patterned after U. S. Supreme Court Rule 58(3). Former Supreme Court Rule 64 and

former Commonwealth Court Rule 113A permitted an answer to a petition for reargument in all cases. See also Rule 1123 (reconsideration of denial of petition for allowance of appeal).

Amended Dec. 11, 1978, effective Dec. 30, 1978.

Rule 2546. Transmission of Papers to and Action by the Court

Upon receipt of the application for reargument, the application shall be distributed by the prothonotary to the court for its consideration. If an application for reargument is granted the court may restore the matter to the calendar for reargument, or if a reply to the application has been requested by the court, the court may make final disposition of the matter without further oral argument or may take such other action as may be deemed appropriate under the circumstances of the particular case. Reargument may be allowed limited to one or more of the issues presented in the application, in which case the order allowing the reargument shall specify the issue or issues which will be considered by the court.

Rule 2547. Subsequent and Untimely Applications

Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules, will not be received.